

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION  
3 UNITED STATES OF AMERICA, ) Case 1:18-cr-00457  
4 Plaintiff, )  
5 v. ) Alexandria, Virginia  
6 BIJAN RAFIEKIAN, ) July 22, 2019  
7 Defendant. ) 9:16 a.m.  
8 ) Day 6 (AM Session)  
9 ) Pages 956 - 1047

9 TRANSCRIPT OF TRIAL  
10 BEFORE THE HONORABLE ANTHONY J. TRENGA  
11 UNITED STATES DISTRICT COURT JUDGE  
12 AND A JURY  
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25 COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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16 THE DEFENDANT, BIJAN RAFIEKIAN, IN PERSON

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**I N D E X**

<u>DEFENDANT'S WITNESS</u>	<u>EXAMINATION</u>	<u>PAGE</u>
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1 THE COURT: Criminal Case 18-cr-457, *United*  
2 *States v. Bijan Rafiekian*.

3 Counsel, will you please note your  
4 appearances for the record.

5 MR. GIBBS: Good morning, Your Honor. John  
6 Gibbs, Jim Gillis, Evan Turgeon, Latoya Horsford, Katie  
7 Sweeten, and Bryan Alfredo on behalf of the United  
8 States.

9 THE COURT: Welcome.

10 MR. MACDOUGALL: Good morning, Your Honor.  
11 The defendant, Mr. Rafiekian, is present in court.  
12 Mark MacDougall for Mr. Rafiekian along with Robert  
13 Trout, Stacey Mitchell, James Tysse, and our senior  
14 legal assistant, Adria Hicks, is with us today.

15 Thank you, Your Honor.

16 THE COURT: All right. Welcome to everyone.

17 Mr. Gibbs, do you have any issues you want to  
18 raise? I have my own list but --

19 MR. GIBBS: No, Judge. We'll take up your  
20 list.

21 THE COURT: Okay. Mr. MacDougall?

22 MR. MACDOUGALL: The same, Your Honor. We'll  
23 work with your list.

24 THE COURT: All right. I reviewed the  
25 instructions over the weekend and drafted up the

1 revised instructions as to the substantive offenses  
2 themselves, and I gave those to you. Before I give  
3 those, I'll consider further argument on it.

4 I will tell the United States: I did those  
5 without the benefit of your instructions. Although,  
6 I've now reviewed them, and I think I tried to capture  
7 pretty much what you were trying to do in those. I'm  
8 sure you will have some other comments you would like  
9 me to consider, but we'll take that up, obviously,  
10 before I give them.

11 Let me tell you a couple of other things that  
12 I have concluded in connection with the instructions:

13 After reviewing this issue, I have concluded  
14 that a showing of willfulness is not required with  
15 respect to proving that conduct does not constitute a  
16 legal commercial transaction because in violation of  
17 Section 612(a), that statute simply is a blanket  
18 prohibition on acting as a foreign agent without  
19 requiring that it be done willfully; although, criminal  
20 liability would only attach upon such a showing. So  
21 the willfulness issue has not been included with  
22 respect to the object of the conspiracy that  
23 constitutes a violation of Section 951.

24 I've also concluded that I will give an  
25 advice of counsel instruction, particularly in light of

1 the conspiracy charge.

2           The Court is not going to give a missing  
3 witness instruction. As the parties have candidly  
4 conceded, there's been no restriction on access to  
5 General Flynn, who is subject to subpoena by both  
6 sides. And based on all the circumstances and  
7 information available to the Court, instructing the  
8 jury to draw the requested inferences would not be  
9 warranted.

10           With respect to materiality, it seemed to me  
11 that the only issue as to which materiality is an issue  
12 is within the context of the 618(a)(2) violation that's  
13 alleged as part of the conspiracy. So I've included  
14 the materiality instruction within the context, again,  
15 of the conspiracy charge.

16           There really is no settled law on how to  
17 articulate materiality within the context of this case.  
18 I mentioned the *Escobar* decision which was within the  
19 context of the False Claims Act. There the Supreme  
20 Court made clear that something more than a potential  
21 to influence is required. That statute is, obviously,  
22 very different since it deals with what's material with  
23 respect to a particular contract or a particular  
24 contract requirement.

25           But I do believe that something more than

1 simply potential to influence was required, and I've  
2 tried to frame it in terms of the objectives of the  
3 disclosure requirement, albeit in more summary form.

4 I know the government's proposed jury  
5 instruction sort of went down that line in a lot more  
6 detail, but I'll entertain more argument on the  
7 materiality definition.

8 Finally, with respect to the application of  
9 Rule 801(d)(2)(E), the Court is going to adhere to its  
10 previous rulings with respect to the application of  
11 Rule 801(d)(2)(E), specifically that the out-of-court  
12 statements of either Mr. Alptekin or General Flynn or  
13 any other person are not admissible under the hearsay  
14 exception for coconspirator statements. In that  
15 regard, the Court has considered the government's  
16 argument that 801(d)(2)(E) does not require a criminal  
17 conspiracy and can be based on lawful conduct involving  
18 a common plan or a joint venture.

19 The Court appreciates that there are courts  
20 that have adopted that view; although, others have not.  
21 The Court has not found anything said by the Fourth  
22 Circuit that would be controlling or even predictive of  
23 how it would decide that issue. In the Court's view,  
24 the notion that 801(d)(2)(E) can apply to any lawful  
25 common plan is inconsistent with the language and

1 purpose of the coconspirator hearsay exception and  
2 would essentially collapse 801(d)(2)(E) with  
3 801(d)(2)(D) and essentially make it a criminal  
4 proceeding against someone who is a corporate officer  
5 or an employee, nearly any intercorporate statement by  
6 any officer, director, or employee a result that the  
7 Court can't justify either under the rule or even the  
8 constitutional protections applicable to criminal  
9 proceedings. So the Court will adhere to its previous  
10 ruling.

11 That's pretty much all I have.

12 Anything, Mr. Gibbs or Mr. Gillis?

13 MR. GILLIS: Your Honor, obviously, we've  
14 all, at least those who hoped to argue the case today  
15 on our side in particular, which would be me, have  
16 spent a great deal of time putting together our  
17 argument on the conspiracy. If you would give me one  
18 last opportunity to try to persuade you, if you are  
19 willing to hear it, I would like to address that one  
20 more time.

21 THE COURT: Well, I'm not precluding you from  
22 arguing that there was a conspiracy.

23 MR. GILLIS: What I was going to propose,  
24 Your Honor, is with respect to the finding on the  
25 preponderance of the evidence. I would like an



1 opportunity to argue why the Court should find that  
2 there was a preponderance.

3 THE COURT: All right.

4 MR. GILLIS: I know, Your Honor, that you  
5 have considered all of the evidence carefully, and I  
6 just want to make sure that we have articulated  
7 carefully our response to that. I'd like you to  
8 begin -- and I'm sure you're familiar with it -- with  
9 this 8(b) that begins these communications. It is on  
10 July 27, Your Honor, 2016. It's just a few days after  
11 the coup in Turkey, which took place on the 15th.

12 (There's a knock on the jury room door.)

13 MR. GILLIS: There's a knock at the door,  
14 Your Honor.

15 THE COURT SECURITY OFFICER: It's okay.

16 MR. GILLIS: From that exhibit, Your Honor,  
17 the defendant tells Alptekin: We are ready --

18 It's clear from that document that there were  
19 conversations that preceded that. That's not merely  
20 speculative. It's a fair inference to draw from the  
21 language of that very writing, and he goes on. Then in  
22 8(b) it's clear that he's not only talking about a  
23 project that they had discussed before, but it's a  
24 project that Alptekin had to confer with the foreign  
25 minister of Turkey about.

1           Again, this is at a critical time, after a  
2 coup that shook the foundations of the Turkish  
3 government. This is an important enough engagement to  
4 involve the foreign minister of Turkey, the minister of  
5 economy, the council of ministers, and the prime  
6 minister himself.

7           In the days following the coup -- this is not  
8 about tourism or the business community or anything of  
9 the sort. The defendant admits that he was engaged  
10 during this time in an effort to obtain business from  
11 the government of Turkey, which would be under the  
12 government of Turkey's control and direction. It would  
13 be an outright contract between the two.

14           Alptekin says he's going to report back to  
15 the defendant after his meeting with the foreign  
16 minister. It's clear from what the defendant said to  
17 Alptekin -- this is all in Government's Exhibit 8B --  
18 that whatever he had to say to him that was going to be  
19 communicated to the foreign minister was very good  
20 news. It was important enough for Alptekin to bring it  
21 to the attention of the foreign minister less than two  
22 weeks after the coup.

23           Then the next e-mail in that chain shows the  
24 defendant responding directly to Alptekin's statement  
25 about meeting with the foreign minister. The defendant

1 says: We're ready to engage in what needs to be done.

2           Then he goes on to say this, which is  
3 critical, Your Honor, for this conspiracy. You've  
4 asked what is the evidence of conspiracy? Obviously,  
5 there's not going to be any direct evidence of it. But  
6 taking all the circumstances together, this shows that  
7 what began as something that was admittedly under the  
8 direction and control of the Turkish government stayed  
9 the same throughout this entire project right up until  
10 the time that the op-ed was written.

11           That is clear because in 8B, at the bottom of  
12 that e-mail -- and if it would be helpful, Your Honor,  
13 I can have --

14           THE COURT: I have it.

15           MR. GILLIS: The defendant says: Turkey's  
16 security and stability is extremely important to world  
17 security. Erdogan can lead this campaign against  
18 radical Islam.

19           Which throughout has been code for Gulen.  
20 That was the theme, as I said, that carried through.  
21 It was a drum that the defendant was going to beat  
22 throughout the entire project, whether it was when he  
23 was calling it Truth or when he was calling it  
24 Confidence. It continued throughout, including, as I  
25 said, to the op-ed.

1           Now, in there, he says: At the right time, I  
2 will include our partners in the communication.

3           Now, what's significant about that, Your  
4 Honor, is not that that -- they're trying to say -- you  
5 know, they're trying to talk more about wins than  
6 losses. This has been talking about confidentiality  
7 throughout this thing, and at the right time, to  
8 include the others is only once they stop talking about  
9 Truth and the Turkish ministers and Gulen directly and  
10 they start talking about Confidence in the business  
11 community and whatnot, hiring them.

12           So what that 8B tells you is that the  
13 defendant is aware of Alptekin's connections at the  
14 highest level. He's aware that Alptekin is reporting  
15 to him communicating what the foreign minister and  
16 other ministers had to say about this project and that  
17 this being right after the time of the coup is an  
18 extremely important project that's got nothing to do  
19 with tourism or foreign investment in the business  
20 community of Turkey.

21           The whole project at that time is all about  
22 Gulen. And as you've heard from the witnesses and  
23 you've seen from the documents in this case, that  
24 remained the single-minded focus of this project  
25 throughout both before and after they switched the name

1 of the project.

2           And what's important about that, Your Honor,  
3 is that they are operating under -- and now if you  
4 look -- sorry. If they're operating under the  
5 direction and control of the Turkish government, you  
6 can see that from Exhibit 9, which is a continuation of  
7 e-mail exhibits in 8B.

8           And this exhibit shows you, again, that  
9 Alptekin is the conduit to the defendant for the  
10 communications from the ministers of Turkey, and the  
11 minister of Turkey is taking this project very serious  
12 because he wanted to meet with the defendant and Flynn.  
13 He wanted the defendant and Flynn and Alptekin to  
14 formulate what kind of output they could generate, and  
15 he wanted them to provide an indicative budget.

16           Your Honor, that is all three, direction and  
17 control. It is direction. The foreign minister wants  
18 to meet with them, directing them to meet with them,  
19 directing them to formulate the kind of output they  
20 could provide, and directing them to come up with an  
21 indicative budget. All of this is coming from the  
22 foreign minister of Turkey.

23           Now, if you turn to Exhibit 10, you're  
24 familiar with this one because this is where they first  
25 mention in the subject Truth. Those nine bullet

1 points, which you've seen throughout, those nine bullet  
2 points become exactly the same bullet points that they  
3 used to describe the Confidence project. Once, only  
4 once they bring in the other people at FIG.

5           And as those bullet points show, Rafiekian  
6 starts off by saying he wants Alptekin's active  
7 participation in this project, and that's leading up to  
8 the 20 percent cut that Alptekin is going to get. And  
9 that, in the later bullet points, when it's talked  
10 about Covington goes from to secure your active  
11 participation when he's talking to Alptekin. And then  
12 when he's talking to the group about Confidence, it's  
13 to secure the active participation of an outside  
14 advisor. And that is included -- his 20 percent is  
15 specifically included in the budget on this thing that  
16 he's passing out.

17           Now, in Exhibit 15, Your Honor, this is the  
18 one that attaches to it the article. You can see from  
19 15 that Alptekin is responding directly to the nine  
20 bullet points for Truth that the defendant had set  
21 forth and sent to him. In that, he says: I met with  
22 the MFA and explained our proposed approach. We'll  
23 strategize on how best to approach that meeting.

24           This article that he attaches shows the depth  
25 of the crisis that we are facing, and that article,

1 Exhibit 15A, is all about how the U.S. has turned in  
2 the wrong direction from their point of view. It's  
3 favorable to Gulen, and it's negative toward Erdogan.  
4 It points out specifically Turkey's efforts to  
5 extradite Gulen. They point out that Turkey should be  
6 reminded that they have to follow the rule of law and  
7 they have to wait for the government's approval.

8 Now, directly in response to this August 4  
9 e-mail, the defendant sets forth this famous analogy  
10 about Khomeini under the apple tree and comparing him  
11 to Gulen. At the end of that, he returns to this  
12 refrain about the world's need for a strong leader with  
13 credibility in the Islamic faith. And this, again,  
14 stays the theme throughout.

15 On August 8, he's -- this is -- less than a  
16 meeting after the attempted coup. Alptekin is  
17 responding back and says that he has had a long meeting  
18 with the minister of foreign affairs. Alptekin  
19 explained what he and the defendant and Flynn could  
20 offer.

21 So this is all indicative, Your Honor, of an  
22 agreement up to this point to work with the government  
23 of Turkey to paint Gulen as a bad figure who should be  
24 extradited, that we should raise up Erdogan, keep him  
25 close to us, and get rid of Gulen.

1 THE COURT: The conspiracy, though, is an  
2 agreement to do all of that unlawfully --

3 MR. GILLIS: Yes, sir.

4 THE COURT: -- that is, without the required  
5 notifications.

6 MR. GILLIS: Yes, sir.

7 THE COURT: Whether the defendant was  
8 required to file or whether he filed properly is a  
9 separate issue --

10 MR. GILLIS: Yes, sir.

11 THE COURT: -- from whether or not there was  
12 an agreement with somebody that he would not do that.

13 MR. GILLIS: Yes, sir.

14 THE COURT: And that's where I'm sort of  
15 pulling up short.

16 MR. GILLIS: All right. So if I may, first,  
17 the importance of this then August 10 e-mail, if I may.  
18 August 10 --

19 THE COURT: Which exhibit?

20 MR. GILLIS: Government's Exhibit 16.

21 THE COURT: All right.

22 MR. GILLIS: Okay. So on August 10, Your  
23 Honor, they get the green light from the minister of  
24 foreign affairs that after several meetings that he's  
25 had --



1 Do you want me to stop for a moment?

2 THE COURT: No. I'm fine.

3 MR. GILLIS: Okay. It's several meetings  
4 with the minister of commerce -- or, rather economy,  
5 the foreign minister about this project. Alptekin  
6 tells the defendant -- while they're still calling it  
7 the Truth campaign, while it's still admittedly being  
8 done under the direction of the government of Turkey,  
9 he tells the defendant that he has a green light to  
10 discuss confidentiality, budget, and the scope of the  
11 contract. That's on August 10.

12 THE COURT: Right.

13 MR. GILLIS: The very next day, August 11, is  
14 when all of a sudden there's this first reference. As  
15 the agent testified, it's the first reference to  
16 Confidence anywhere, and the defendant and Alptekin  
17 both lie to their attorneys about this notion that the  
18 government of Turkey had simply dropped the ball. They  
19 dropped the project, and suddenly Alptekin had decided  
20 to start this entirely different project completely  
21 unrelated to the one beforehand. That was the  
22 testimony from the Covington lawyer, Mr. Kelner.  
23 That's the only testimony that's been on this.

24 It is this lie, Your Honor, that overnight it  
25 goes from the government of Turkey directing and

1 controlling this effort. Regardless of what you  
2 believe up until this point that there was some  
3 lawfulness to that agreement, overnight it goes from  
4 being the Truth project controlled by the government of  
5 Turkey about Gulen and it goes then to Confidence. The  
6 government of Turkey, we say, but under Alptekin  
7 supposedly being the one who is now interested in this  
8 project to improve or restore the confidence in the  
9 Turkish investment client. And he says --

10 THE COURT: Weren't the two related? Wasn't  
11 the testimony consistent that the two were related,  
12 that people viewed exposing and extradited Gulen as  
13 somehow related to restoring confidence in the  
14 environment in Turkey?

15 MR. GILLIS: Your Honor, that was a fig leaf  
16 that was applied.

17 THE COURT: Well, I'm just saying; wasn't  
18 that a part of the testimony?

19 MR. GILLIS: It was, Your Honor, at the very  
20 beginning. What was testified to was at the very  
21 beginning, there's one or two references to this notion  
22 of restoring confidence. Every witness testified that  
23 while -- in fact, some of them testified that from the  
24 get-go, it was about Gulen. Some of them did testify  
25 that it was about restoring confidence in the Turkish

1 economy, but that never --

2 THE COURT: And confidence in or a better  
3 understanding of why President Erdogan was doing what  
4 he was doing.

5 MR. GILLIS: Yes. Again, that was ostensibly  
6 the purpose that was given at the very beginning in the  
7 first presentation, the first communications with  
8 Sphere, with Mr. Courtovich about what this project was  
9 supposedly about. That initial faint in that direction  
10 stopped being the case and went from Gulen, Gulen,  
11 Gulen. Nothing about any investigations about the  
12 business climate, nothing about the American business  
13 attitudes toward Turkey. Nothing about that. It's all  
14 about dirt on Gulen. It's all about getting, you know,  
15 where is the action by DOJ who, by the way, is --

16 THE COURT: How is that probative, that  
17 switch as you've described it --

18 MR. GILLIS: Yes.

19 THE COURT: -- probative of an agreement to  
20 violate the registration requirement?

21 MR. GILLIS: Yes, sir. Well, first of all,  
22 the switch is powerful evidence that overnight there's  
23 a lie here, right? There's a lie overnight. There's  
24 no way in the world that the government of Turkey  
25 dropped this after giving the green light from the

1 foreign minister on the 10th, that overnight they  
2 switched to confidence in the investment climate, which  
3 was never mentioned before this switch and never truly  
4 mentioned in any detail, nor gone into in any sort of  
5 way in the project.

6 But the part about it being completely  
7 unrelated is a lie that he told that -- whether you  
8 view Gulen and the investment climate as some sort of  
9 connection -- which he tried to say yes, but then later  
10 completely ignored. What happened between the 10th and  
11 the 11th is a lie. It was just a flat-out lie.

12 THE COURT: I guess --

13 MR. GILLIS: And so, Your Honor --

14 THE COURT: Let me ask this.

15 MR. GILLIS: Yes, sir.

16 THE COURT: How do you square -- again, I'm  
17 dealing with this in my role as a fact-finder under  
18 Rule 104 --

19 MR. GILLIS: Yes, sir.

20 THE COURT: -- which can be based on all  
21 kinds of things. It doesn't even have to be admissible  
22 evidence. In fact, the Court had considered matters  
23 that aren't yet in evidence in reaching its first  
24 ruling.

25 But how do you square this notion of an

1 agreement to do all the things that you're talking  
2 about, a conspiracy to do that in violation of the  
3 registration requirements --

4 MR. GILLIS: Yes, sir.

5 THE COURT: -- with all the evidence that has  
6 been put in so far dealing with what was publically  
7 disclosed as to the interest and involvement of the  
8 Turkish government in exposing Gulen?

9 MR. GILLIS: Yes, sir. Well, we're not  
10 contesting -- I mean, obviously, our first witness on  
11 there was that Turkey was trying its best to get Gulen  
12 extradited.

13 THE COURT: Right.

14 MR. GILLIS: That approach was not working.  
15 They had hired Robert Amsterdam.

16 THE COURT: I guess that's the question. How  
17 do you square the notion that there was an agreement to  
18 conceal Turkey's involvement in exposing Gulen with all  
19 the public disclosures of Turkey's involvement with  
20 disclosing Gulen?

21 MR. GILLIS: Yes, sir. How I square it is  
22 this: First of all, it's not about the government  
23 trying to hide that it wanted Gulen extradited. It's  
24 not about that.

25 What it's about and what the statute is

1 intended to prevent is getting Lieutenant General  
2 Michael T. Flynn, as the national security advisor to  
3 the republican candidate for president, for him to get  
4 out there and say that this guy has got to go. There's  
5 this -- and you'll see from the documents, and you'll  
6 see from the testimony -- you've heard from the  
7 testimony that the op-ed was part of this from the  
8 start. They lied about that. They said it was  
9 completely unrelated to the Turkey project.

10           What happened is, first, you've got the  
11 e-mail, the first draft. And I mentioned this before,  
12 but let me, if I can, remind the Court. There's this  
13 blow-up at early November at FIG's office, and Alptekin  
14 is angry about it. Nothing has happened. The video  
15 hasn't been done, and basically, there's no progress.  
16 He says, Your Honor: What am I going to show Ankara?  
17 Where is the media attention? Where is congressional  
18 hearings? Where is action by DOJ, parentheses,  
19 extradition?

20           Following right after that, Your Honor: What  
21 am I going to say to Ankara? I've got to show progress  
22 to Ankara.

23           It's immediately after that that the  
24 defendant then drafts this op-ed, and he sends it first  
25 to Alptekin. He says there: A promise made is a

1 promise kept.

2 That is an agreement, Your Honor, and it's  
3 unlawful because it is not going to be disclosing  
4 Lieutenant General Michael T. Flynn that he's getting  
5 paid and encouraged to write this stuff as part of a  
6 90-day project that started off being directed by the  
7 government of Turkey. In fact, the defendant himself  
8 in his e-mail postdating the agreement said: We've  
9 been at work on this since July 15.

10 So this is one long continuum that overlaps  
11 the time when it is admittedly under the direction and  
12 control of the Turkish government postdating the  
13 agreement to a point after it was supposedly this  
14 Confidence project.

15 THE COURT: All right.

16 MR. GILLIS: So how we square it, Your Honor,  
17 is in this way: It is the entire purpose of this  
18 statute to prevent a high profile person and others --  
19 the Flynn Intel Group was certainly known to be  
20 affiliated with, run by, formed by Lieutenant General  
21 Flynn. And those folks are out lobbying congressmen  
22 without telling them about who they're doing it for.  
23 They're out there trying to gin up more public  
24 attention on this.

25 So everything that Alptekin is saying in the

1 meeting that he blew up about is what is trying to be  
2 fulfilled by the defendant in this article that says "a  
3 promise made is a promise kept."

4 THE COURT: All right.

5 MR. GILLIS: So, Your Honor, if you'll  
6 just --

7 THE COURT: All right.

8 MR. GILLIS: You know, I have gone this far.

9 THE COURT: Go ahead.

10 MR. GILLIS: If you'll indulge me for a  
11 couple of more minutes.

12 Now, Your Honor, there is nothing. As you  
13 heard, the first mention of Confidence is on August 11.  
14 The defendant claims and Alptekin claimed that the  
15 project that they were discussing with the government  
16 of Turkey was completely unrelated. That has got to be  
17 very strong evidence of a conspiratorial agreement that  
18 we're not going to disclose that the government of  
19 Turkey has given the green light and wants an  
20 indicative budget, has directed them to maintain  
21 confidentiality.

22 They've done all of this on the 10th, and  
23 overnight it switches to this. They lie about it being  
24 completely unrelated. That lie, Your Honor, is  
25 exceptionally strong proof that there was a tacit



1 understanding not to reveal the true purpose of this  
2 project.

3           There's no mention in any of the e-mails, the  
4 thousands of e-mails that the agents scoured, no  
5 mention whatsoever of the government of Turkey dropping  
6 the ball or deciding they're not going to go through  
7 with the project. But on the 10th of August, they say:  
8 You have the green light for it. No evidence -- not  
9 only is there no -- there's positive evidence that they  
10 never mentioned it.

11           Now, think about that, Your Honor. You've  
12 got the prime minister being advised about this. It's  
13 being taken up by the council of ministers of Turkey.  
14 It has the active involvement of the foreign minister.  
15 Out of all of this, out of all of this, there's no  
16 mention -- wouldn't there -- there's a lot of e-mails  
17 before this, e-mail traffic, Skype chats, and whatnot  
18 about this project. Wouldn't you see some e-mail,  
19 something that said, Gee, it's too bad we lost that  
20 contract with the Turkish minister. We were so close.  
21 We had the green light and everything from the foreign  
22 minister of Turkey, and there's nothing. They don't  
23 say a word about that.

24           They don't say a word about it to anybody  
25 else, and they make a point that they don't say it to

1 anybody outside FIG. But they don't say a word about  
2 it to Mike Boston, who's the project manager on this  
3 project that's doing exactly the same thing that they  
4 had promised to do under the earlier project.

5 And the keeping of that secret and the  
6 failure to mention anything about it shows you very  
7 strongly that this is a lie. It's a lie, and that  
8 means there's a tacit understanding not to register.

9 And, Your Honor, with respect to the  
10 conspiracy not to register, what you'll see from the  
11 evidence is that, yes, Alptekin went to Robert Kelley.  
12 Flynn tells him -- you know, he comes out. McCauley  
13 sees him. He comes out of the office of General Flynn.  
14 He tells McCauley: The General wants me to file under  
15 FARA, but I've got a better way to keep it under the  
16 radar.

17 He goes to his friend, Bob Kelley, who  
18 testified that he did this not as a lawyer, not as his  
19 lawyer but as his friend.

20 He asked me a question. I told him, you  
21 know, if it's a private client, then you can file under  
22 the LDA.

23 That's it. That's the only thing he does.  
24 Again, he's tell -- that alone is a lie, I submit,  
25 based on all of what you've heard so far, that the

1 government of Turkey is really the one behind this.

2 But the most telling thing about this, Your  
3 Honor, is that that is an active issue that is at play,  
4 as you heard from the testimony, when they have this  
5 University Club meeting. You remember the University  
6 Club meeting was on September 20. On September 19,  
7 they're meeting with the foreign minister and Erdogan's  
8 son in-law, and in the e-mail that Rafiekian sent, he  
9 says that it's about Confidence.

10 McCauley heard what was going on. At least  
11 to the extent that he could hear -- he was at one end.  
12 He said that Woolsey was being disruptive. But he  
13 heard the foreign minister and Flynn discussing Gulen,  
14 that he was a terrorist, that he had to go, and the  
15 extradition that Turkey was interested in. So there's  
16 even e-mails that the subject of which is LDA versus  
17 FARA.

18 Graham Miller on September 19 says: Could  
19 you give me a copy of Kelley's opinion that we could  
20 file under LDA?

21 And he responds back: I'll put you in touch  
22 with Kelley.

23 Kelley testified that he don't do anything  
24 else except answer that one question and then file the  
25 LDA form. He didn't say he didn't -- in fact, he said

1 he did nothing else. So that conversation never took  
2 place.

3 But we also know that there was never any  
4 opinion letter. The defendant never went back to  
5 Kelley for an opinion letter, a formal letter, because  
6 now Kelley would have been acting as his lawyer, and he  
7 would be -- he would then be asking questions. And  
8 that's not speculation, Your Honor. That is just  
9 common sense inference from the facts.

10 But what is happening here? FARA and LDA is  
11 a live issue, and he tells them that we're returning  
12 from New York. He doesn't mention what that meeting is  
13 about. He said it's about Confidence and a  
14 cabinet-level position. He says nothing about that at  
15 the meeting at the University Club.

16 Now, he claims that it was just to get  
17 background. It was just background on Gulen. Well,  
18 why doesn't he say anything about that at the meeting  
19 that's the -- you know, the talk about the status of  
20 the project? Why doesn't he say: Hey, you know,  
21 coincidentally, we just happened to be in New York last  
22 night, and we were talking with the foreign minister.  
23 We were actually talking to Erdogan's son-in-law. And,  
24 you know what? They gave us their views on Gulen.  
25 He's a terrorist. He thought this, and he thought

1 that.

2 And he says nothing to the whole team over  
3 there. He says nothing at all.

4 That is, again, this tacit understanding that  
5 they are not -- no matter what, they are not going to  
6 reveal this relationship between them. And you ask  
7 about what makes it not a lawful transaction? It's  
8 that LDA filing because of the lie that he told to  
9 Kelley. It's clear from this throughout that that was  
10 one of the purposes, and that was one of the overt acts  
11 that carried out.

12 That, among other things, is what made it not  
13 a lawful commercial transaction, by lying to Kelley and  
14 getting him to file an LDA and also to keep this secret  
15 about this meeting in New York while this whole issue  
16 of where to file is still an open question.

17 The telling thing, Your Honor, is that these  
18 conversations, the direction and control from the  
19 government of Turkey, continue because you'll recall at  
20 least two Skype chats that took place afterward, after  
21 they said the Turkish government is out of this, that  
22 this has nothing to do with the Turkish government.

23 What you see is a Skype chat. One Skype chat  
24 that says: We are a go. I just met with the foreign  
25 minister. I'm hoping to meet with his boss. Not his

1 direct boss but you know who. I inferred this from the  
2 fact that I've been invited to the opening of the Third  
3 Bridge.

4 This is the Bosphorus bridge that Mr. Olson  
5 testified about and the bridge that you judicially  
6 found was open on the 26th.

7 So he tells the defendant: I'm going to be  
8 meeting -- well, first of all he tells them this: You  
9 are a go. We are a go. I have met with the foreign  
10 minister, and we are a go.

11 Then he says: I hope to be meeting with the  
12 prime minister -- or rather, President Erdogan because  
13 he's going to be there.

14 In fact, as you've heard, he was there at the  
15 opening ceremony.

16 Then what happens? Alptekin tells him in  
17 that same conversation: I'm hoping to meet the Turkish  
18 president, but either way we are a full go.

19 He says: We are a full go.

20 That is the direction from the government of  
21 Turkey that he has hidden, that he has kept hidden by  
22 filing a false LDA. So it is that.

23 Again, this is an accretion of evidence that  
24 is inexorably leading to this, at least a preponderance  
25 of the evidence, that there is a conspiracy among them.

1           That's not the only Skype chat because  
2 there's one later, and it is from MC's guy who is read  
3 into the project. That's what Alptekin tells the  
4 defendant. He says, I had a meeting with MC -- in  
5 other words, Foreign Minister Cavusoglu. I heard from  
6 the foreign minister's guy, who is read into  
7 Confidence, and he wants me to write an op-ed about  
8 this.

9           This couldn't be more damming, Your Honor.  
10 It is, first, the foreign minister saying you're a full  
11 go, and Alptekin telling him: No matter whether we  
12 meet the president or not, he told me we are a full go.  
13 This is direction and control from the foreign minister  
14 of Turkey after August 11, after it's supposedly about  
15 business confidence in Turkey.

16           There's another one in which he talks about  
17 the foreign minister's guy who is read into Confidence.  
18 Read into, Your Honor. As you know, read into means  
19 like any classification compartment, you get read into  
20 something, meaning you're told about it in a way that  
21 is secret.

22           THE COURT: All right.

23           MR. GILLIS: So he's read into. It's not  
24 some guy who knows about it, but he's read into it.  
25 He, as part of that Confidence project that he's read

1 into, wants me to write an op-ed.

2 Now, it didn't turn out to be Alptekin that  
3 wrote the op-ed. It turned out to be Lieutenant  
4 General Flynn. However, those two Skype chats coming  
5 after all of this, again, shows you that there is this  
6 continuing conspiracy not just to hide the government's  
7 of Turkey's involvement in what -- I mean, they're  
8 saying it's a lawful transaction. Of course, it's not  
9 a lawful --

10 You see the circularity. I understand what  
11 you're saying about the circularity of 951, but they  
12 lie on the LDA form. That alone, along with all the  
13 other evidence, makes it not a lawful commercial  
14 transaction, Your Honor.

15 THE COURT: All right.

16 MR. GILLIS: I think I'm getting the hook,  
17 Your Honor.

18 THE COURT: All right.

19 MR. GILLIS: All right, Your Honor. Thank  
20 you very much for hearing me out.

21 THE COURT: All right.

22 MR. TURGEON: Your Honor, just one other  
23 thing very briefly. We've received Your Honor's  
24 proposed jury instructions, and we'll continue to  
25 digest those. I expect we'll propose further changes



1 in line with what the government submitted last night.

2 Just before this hearing, though, Your Honor,  
3 the government filed a reply regarding the defense's  
4 proposed legal commercial transaction instruction.  
5 That reply addresses a few issues, including the  
6 willfulness issue that Your Honor just ruled upon. It  
7 also addresses what constitutes unlawful conduct under  
8 951, and that is the subject of one of Your Honor's  
9 proposed instructions.

10 THE COURT: Right.

11 MR. TURGEON: In sum, the defense claims that  
12 the only unlawful conduct was the defendant's failure  
13 to register under FARA, but that's not correct. The  
14 reply explains --

15 THE COURT: No. I understand. You're now  
16 claiming it was the filing of the LDA, but this is an  
17 evolved position. I understand.

18 MR. TURGEON: Well, Your Honor --

19 THE COURT: You've never taken that position  
20 previously; have you?

21 MR. TURGEON: Your Honor, it's a position  
22 that's evident now based on the evidence that's been  
23 introduced at trial.

24 THE COURT: I understand, and I'll consider  
25 whether the instruction needs to make reference to that

1 as well.

2 MR. TURGEON: Thank you, Your Honor.

3 Our brief addresses that point. So I have a  
4 few courtesy copies of that for Your Honor, and I'd ask  
5 that Your Honor consider that before the charge  
6 conference.

7 THE COURT: All right.

8 MR. TURGEON: Thank you.

9 THE COURT: All right. Mr. MacDougall or  
10 someone from your side, I'll give you a brief  
11 opportunity to respond to Mr. Gillis' closing.

12 MR. MACDOUGALL: Yes, Your Honor. I think  
13 Mr. Tysse is going to respond.

14 THE COURT: Yes.

15 MR. TYSSE: Thank you very much, Your Honor.  
16 James Tysse. I'll be brief.

17 I'm happy to answer any questions you have,  
18 but I think Your Honor hit the nail on the head. That  
19 is that the question here is whether there is evidence  
20 of a conspiracy to commit unlawful acts, whether there  
21 was a true partnership in crime. I think what we heard  
22 a lot about was discussions, ambiguous discussions,  
23 hearsay statements from Mr. Alptekin regarding  
24 communications he may have had with Turkey. What is  
25 missing from all of those discussions is any sort of

1 request for direction and control from Turkey itself,  
2 or any sort of agreements on the part of my client to  
3 actually perform any of the unlawful acts that the  
4 government has charged in the indictment.

5           Now, I'm happy to talk about all the  
6 individual pieces of evidence. The government went  
7 through a lot of them. I took some notes but just a  
8 few kind of highlights. You know, they emphasized the  
9 green light e-mail on August 10. What the green light  
10 e-mail says is it's a green light to discuss budget, to  
11 discuss confidentiality. It was not a green light to  
12 go forward with a project. It's not a reasonable  
13 inference to take from that.

14           There was testimony that the -- from the  
15 beginning, the project was about Gulen. But the trial  
16 testimony confirms that the business climate in Turkey  
17 and Mr. Gulen's status in the United States were  
18 intricately related. They were two sides of the same  
19 coin.

20           There was very clear evidence on that,  
21 including from the Sphere Consulting presentation,  
22 which said that the goals of the project would be to  
23 produce a *60 Minutes* style documentary that both  
24 bolstered the business climate and addressed  
25 Mr. Gulen's behavior.

1           Turning to another piece of evidence -- oh,  
2 with regard to the green light e-mail and the  
3 transition from August 10 to 11, none -- there's  
4 nothing inconsistent in any of those e-mails with  
5 Mr. Alptekin talking to someone in Turkey and finding  
6 out from a Turkish minister, "We've already engaged  
7 Robert Amsterdam & Partners for this exact same  
8 project, so we're not going to move forward with it,"  
9 and having FIG move forward with the project on its own  
10 for its own reasons.

11           Again, the government is asking the Court in  
12 this proceeding and the jury more broadly to make these  
13 giant speculative leaps about what very ambiguous  
14 conduct and statements in a series of e-mails actually  
15 say.

16           There is -- there was also a reference to the  
17 reference to Ankara. Again, we addressed this in a  
18 great deal more detail in our brief that we filed  
19 yesterday afternoon, Your Honor, but there was  
20 extensive trial testimony that the client of the  
21 project was Alptekin and Inovo. It was being supported  
22 and funded by wealthy Turkish businessmen. So a  
23 reference to Ankara does not mean a reference to the  
24 government of Turkey.

25           It's also, I would say, inconsistent with the

1 government's own theory that Mr. Rafiekian was keeping  
2 it a secret, along with Mr. Alptekin, Turkey's  
3 involvement from everyone else. If Mr. Alptekin is  
4 going to make a statement with reference to the  
5 government of Turkey at that meeting, it seems very  
6 inconsistent with the goal that this was meant to be a  
7 secret from even their own team.

8           Beyond that, Your Honor, again, ultimately --  
9 and we keep coming back to it -- there has to be an  
10 agreement to actually commit a crime, and that is  
11 what's missing from the government's presentation.

12           One more point on Mr. Kelley. The government  
13 keeps emphasizing that he was just a friend and not a  
14 lawyer. Again, I don't think there was any evidence of  
15 that. He was ultimately paid \$10,000. That's part of  
16 the record.

17           Similarly, they say our client lied to  
18 Mr. Kelley. Again, that's not what the testimony said.  
19 The testimony said: Who is your client? He told him  
20 the answer. It's not the client's job to ask the  
21 lawyer what questions he should be asked and what the  
22 intricacies of the regime are. He went to him and  
23 said: I would like to file under FARA.

24           I don't think there's any reasonable  
25 inference that could be drawn from that, and I think

1 Your Honor has properly concluded that that is not a --  
2 that that was not a lie to Mr. Kelley.

3 I want to make sure, again, to -- oh, I think  
4 one more point as well on the powerful contradictory  
5 evidence of the government's theory. The government  
6 made a lot of arguments about speculative and often  
7 hearsay evidence, but what was missing was any  
8 reference to the contradictory evidence that goes  
9 completely against their theory, which is, number one,  
10 Turkey had already engaged Robert Amsterdam & Partners  
11 for the exact same project and -- or at least a very  
12 similar project. They were paying them openly, and  
13 they had filed openly on a FARA form. That's very  
14 contradictory evidence to the government's entire  
15 theory in this case considering it was also focused, as  
16 we know, on Mr. Gulen.

17 Similarly, the legal advice on multiple  
18 occasions, this was not simply a matter of talking to  
19 Mr. Kelley and getting advice to file under LDA.  
20 Before he contacted Mr. Kelley, the undisputed  
21 testimony is that he went to Mr. Kelley and said: I am  
22 contacting you to find out whether or not we need to  
23 file under FARA.

24 Okay, again, if this was part of a scheme to  
25 hide the true identity and to avoid filing under FARA,

1 that evidence is powerful, contradictory -- or it  
2 contradicts that powerfully in our view.

3           And at the end of the day, Your Honors, this  
4 is a case where the government has asked the jury to  
5 speculate, essentially, that by working on a commercial  
6 project for a paying client that aligns with many of  
7 the goals of Turkey and that Turkey might have been  
8 aware of, that our client actually agreed to act as an  
9 agent of Turkey and to follow Turkey's direction and  
10 control. The record has absolutely no evidence that  
11 Turkey ever gave any direction or control. There's no  
12 statement from Turkey. There's no request from Turkey.  
13 Even at the meeting, the New York meeting that the  
14 government emphasizes so much, there is not a single  
15 piece of testimony that Turkey asked FIG to do anything  
16 or told FIG to do anything or requested or directed FIG  
17 to do anything.

18           At the end of the day, they're asking based  
19 on ambiguous evidence for this Court to speculate for  
20 purposes of this 104 ruling and the jury to speculate,  
21 ultimately, that there was an agreement to commit an  
22 unlawful act. We submit that that is completely  
23 lacking.

24           Thank you.

25           MR. GILLIS: May I have the last word, Your

1 Honor?

2 THE COURT: All right. Briefly.

3 MR. GILLIS: At the risk of annoying --

4 THE COURT: No. It's fine. No, I  
5 understand.

6 MR. GILLIS: I have to address this business  
7 about Robert Amsterdam.

8 THE COURT: Yes.

9 MR. GILLIS: Because, yes, Robert Amsterdam  
10 filed. As we've said, there's no secret that the  
11 government of Turkey wanted Gulen back. The secret is  
12 that they were hiring FIG, Flynn Intel Group, headed by  
13 General Flynn and General Flynn himself to publicly  
14 proclaim the very same position but without revealing  
15 that it was being done at the behest of the Turkish  
16 government.

17 So it is one thing --

18 THE COURT: You're talking about the op-ed?

19 MR. GILLIS: I'm talking about the whole  
20 project, Your Honor. But when Flynn Intel Group, for  
21 example, goes to lobby Congress, that says a lot more  
22 than who's not being disclosed to be the -- if I may.

23 So the last point, Your Honor.

24 THE COURT: Go ahead.

25 MR. GILLIS: It is one thing to have Robert



1 Amsterdam say it as an agent of the government of  
2 Turkey, and it's an entirely different thing to have  
3 Lieutenant Michael T. Flynn -- General Michael T. Flynn  
4 say the same thing but without revealing that it's  
5 being done, paid for, and asked for and approved by the  
6 government of Turkey through Alptekin, who was having  
7 these very high-level discussions with the government  
8 of Turkey.

9 THE COURT: All right. The Court will take  
10 it under advisement as a motion for reconsideration,  
11 and I'll rule when it's appropriate.

12 All right.

13 MR. TYSSE: Your Honor, would you like to  
14 hear objections to the jury instructions now or a  
15 discussion about it or at some later time?

16 THE COURT: Let's do it later. I'd like to  
17 get the jury back out here.

18 Counsel, are you prepared to go forward with  
19 additional witnesses?

20 MR. MACDOUGALL: We are, Your Honor. We have  
21 a single brief witness, and then we would ask to be  
22 permitted to read to the jury the three stipulations of  
23 fact and move them into evidence. That will be our  
24 case, Your Honor.

25 THE COURT: All right. Does the government

1 anticipate any rebuttal?

2 MR. GIBBS: No, Your Honor.

3 THE COURT: All right. Let's bring the jury  
4 out.

5 (The jury enters at 10:12 a.m.)

6 THE COURT: All right. Please be seated.

7 Good morning. I hope everyone managed to  
8 stay cool this weekend.

9 We are now ready to proceed with the  
10 defendant's case.

11 Mr. MacDougall.

12 MR. MACDOUGALL: Thank you, Your Honor. The  
13 defense calls Colonel Mark Mykleby.

14 THE COURT: Colonel Mykleby will come  
15 forward, please.

16 Counsel.

17 MR. MACDOUGALL: Thank you, Your Honor.

18 MARK MYKLEBY, DEFENDANT'S WITNESS, AFFIRMED

19 DIRECT EXAMINATION

20 BY MR. MACDOUGALL:

21 Q Good morning, Colonel Mykleby.

22 A Good morning.

23 Q My name is Mark MacDougall. I'm one of the  
24 attorneys who is representing Bijan Rafiekian. You and  
25 I met for the first time this morning; is that right?

1 A That is correct.

2 Q Could you tell us where you live, please.

3 A I'm currently in Cleveland, Ohio.

4 Q What do you do for a living?

5 A I'm a consultant.

6 Q What kind of consultant?

7 A Job consultant. Some for the Department of Navy  
8 and then also for EcoDistricts, economic development  
9 for municipalities.

10 Q And what did you do before you became a  
11 consultant?

12 A I was a colonel in the Marine Corps, Marine  
13 officer, career.

14 Q How long were you in the Marine Corps?

15 A Twenty-four years in the Marine Corps.

16 Q I'm sorry?

17 A Twenty-four years.

18 Q Twenty-four.

19 And what your speciality?

20 A I was an F-18 pilot.

21 Q Where did you serve?

22 A Most of my operations were out of Beaufort, South  
23 Carolina.

24 Q Anywhere else?

25 A Also up in Quantico, Virginia, for a couple of

1 tours. And then I led a special operations command,  
2 and then I ended up my career at the Pentagon working  
3 for the chairman of joint chiefs of staff.

4 Q What year did you retire from the Marine Corps?

5 A In 2011.

6 Q Do you know the defendant here, Mr. Rafiekian?

7 A Yes, I do.

8 Q Is he sitting at defense table?

9 A Yes, he is.

10 Q And how did you come to know him?

11 A I was introduced to him in, I believe, 2010 by a  
12 gentleman I was working with, Captain Wayne Porter. We  
13 were both working for Admiral Mullen when he was the  
14 chairman of the joint chiefs of staff.

15 Q Who is Admiral Mullen?

16 A Admiral Mullen was the chairman of the joint  
17 chiefs of staff.

18 Q And about what year was that?

19 A About 2010, I believe, is when I first met Bijan.

20 Q So you've known Mr. Rafiekian about nine years;  
21 would that be right?

22 A Approximately, yes.

23 Q And could you give me a little more detail about  
24 what work you've done, what your association has been  
25 with Mr. Rafiekian both back when you were both working

1 for Admiral Mullen and since then?

2 A Right. I believe it was 2010 when we first met,  
3 and Bijan was on the board of directors for the U.S.  
4 Export-Import Bank. I was a special assistant for  
5 Admiral Mullen. At that time, Wayne Porter and I were  
6 doing work for Admiral Mullen and developing a new  
7 strategy for the nation. And Bijan took an interest in  
8 it and -- in the work that we were doing. And at that  
9 point, it was mostly social.

10 Once I retired in 2011, in 2012 Bijan asked me to  
11 help stand up a small technology company called Green  
12 Zone Systems. So I worked as a paid consultant for  
13 getting Green Zone Systems up and running from about  
14 2012 to 2015.

15 Q When you say "stand up" a company, what does that  
16 mean?

17 A It was very -- just a small technology company.  
18 So we were just organizing, developing a product,  
19 specifically that would -- a communications product  
20 that would help support special operations forces and  
21 special tactical units for law enforcement.

22 Q Have you had other involvement with Mr. Rafiekian  
23 over the last nine years?

24 A Just mostly on a social basis.

25 Q How often do you speak with Bijan on average?

1 A Oh, probably now not all that often. Probably  
2 about once every couple of months.

3 Q Do you know his family?

4 A Yes, we do.

5 Q Do you know his wife, Gissou?

6 A Yes, I do.

7 Q Is she here in the courtroom today?

8 A Yes, she is.

9 Q Would you point her out, please.

10 A She's right there.

11 Q So generally speaking, how well do you know  
12 Mr. Rafiekian?

13 A I know him fairly well. I got to work with him  
14 both, you know, professionally but then also on a  
15 social basis.

16 Q And do you have an opinion as to whether he's a  
17 truthful person?

18 A He's always been truthful with me.

19 Q I'm sorry. I spoke over you.

20 A He's always been truthful with me.

21 Q How certain are you of that opinion?

22 A I'm very certain of that.

23 Q What's it based on?

24 A My personal experience. He's told me -- he  
25 basically has always done what he said he was going to

1 do when dealing with me.

2 Q To the extent you've observed him with other  
3 people, is that your experience as well?

4 A As far as my observations, yes.

5 MR. MACDOUGALL: No further questions, Your  
6 Honor. Thank you.

7 THE COURT: All right. Mr. Gibbs.

8 MR. GIBBS: Thank you, Judge.

9 CROSS-EXAMINATION

10 BY MR. GIBBS:

11 Q Now, Colonel Mykleby, I believe you testified  
12 about being hired by the defendant in 2012 to work with  
13 Green Zone. Is that correct?

14 A That's correct.

15 Q All right. Did the defendant specifically hire  
16 you?

17 A The actual source of the capital was from NJK  
18 Holdings. It was a company underneath NJK Holdings,  
19 but he specifically made the connection. He was the  
20 president of the company and hired me to be the senior  
21 advisor of strategy.

22 Q Okay. So he -- you had an interview with him, sat  
23 down and talked about it, determined it was a good fit,  
24 and he actually was the one who hired you for the --  
25 and the position was senior advisor, correct?

1 A Senior advisor for strategy, that's correct.

2 Q Right, senior advisor for strategy.

3 And that was -- and you held that position from  
4 2012 to 2015; is that correct?

5 A Approximately, yes.

6 Q And was the defendant your boss?

7 A Yes.

8 Q And how much were you paid in that position?

9 A I was paid -- I believe it was about \$150 an hour  
10 consulting fee.

11 Q And how many hours would you generally bill in  
12 that position?

13 A I, roughly, did about ten hours a week, something  
14 like that.

15 Q Okay. So not a full-time position then?

16 A No.

17 Q Okay. And then you testified on direct that the  
18 defendant hired you for that position in 2012, and that  
19 lasted until about 2015, correct?

20 A That is correct.

21 Q And what happened in 2015? Is that when you moved  
22 to Cleveland?

23 A No, I didn't move to Cleveland. But the work that  
24 I was doing, my primary job was, again, developing  
25 concepts around grant strategy. I was at New America



1 Foundation and then was hired by Case Western Reserve  
2 University to stand up a strategic innovation lab.  
3 That was just going to take up more time. Quite  
4 honestly, I am not a business guy. Helping Green Zone  
5 Systems get off the ground, my connections with special  
6 operations command, I pretty much had served my  
7 purpose. So it was just time to move on.

8 Q Okay. And I want to talk about moving on. So  
9 when did you get hired with Case Western Reserve  
10 University?

11 A I got hired by Case Western approximately around  
12 September 2014, somewhere around that neighborhood.

13 Q And when did you actually -- so -- and when did  
14 you actually move to the Cleveland area as part of that  
15 position?

16 A I didn't. I commuted from Beaufort, South  
17 Carolina. The position that I had was not -- it didn't  
18 require me to be at Cleveland, so I just commuted from  
19 Beaufort, South Carolina.

20 Q Okay. Yeah, and I think maybe I misunderstood  
21 your direct testimony. But so you currently live in  
22 Beaufort, South Carolina, correct?

23 A I'm transitioning right now. I recently just  
24 moved to Cleveland.

25 Q Okay. When did you move to Beaufort?

1 A I first got to Beaufort -- it was my first duty  
2 station -- somewhere around December 1990,  
3 January 1991.

4 Q But recently. So -- well, let me to do it this  
5 way: Where were you living for all of 2016?

6 A In Beaufort, South Carolina.

7 Q Where were you living for all of 2017?

8 A Beaufort, South Carolina.

9 Q So when you testified on direct that your  
10 interactions with the defendant were fairly  
11 intermittent, that's because you two lived in different  
12 cities, correct?

13 A That's correct.

14 Q And so -- okay. So when's the last time you and  
15 the defendant actually lived in the same place?

16 A I'm not sure that we ever lived -- well, I take  
17 that back. When I was at the Pentagon, I lived in D.C.  
18 I was a geographical bachelor, and he lived in the  
19 area. I never visited Bijan's home.

20 Q Okay. Fair enough. So it's really a professional  
21 relationship?

22 A For the most part, yes.

23 MR. GIBBS: Great. One moment.

24 (Counsel confer.)

25 MR. GIBBS: Thank you, Judge.

1           Colonel Mykleby, I have no further questions.

2 Thank you, sir.

3           THE COURT: All right. Anything further?

4           MR. MACDOUGALL: Nothing else, Your Honor.

5           THE COURT: All right. Thank you for  
6 appearing. Please do not discuss your testimony  
7 outside of the courtroom.

8           THE WITNESS: Yes, sir.

9           (The witness stands aside.)

10          THE COURT: Mr. MacDougall.

11          MR. MACDOUGALL: Your Honor, we have the  
12 three stipulations to read into evidence and move into  
13 evidence.

14          THE COURT: All right. Ladies and gentlemen,  
15 you're now about to hear statements that have been  
16 agreed to by the parties. You may accept the  
17 statements as proof of the facts stated in those  
18 stipulations, but it's up to you as far as what weight  
19 or importance you attach to them.

20          Yes.

21          MS. MITCHELL: Good morning, Your Honor.

22 Thank you.

23          Good morning. Referring now to Defendant's  
24 Exhibit 66, Stipulated Statement of Fact No. 1:

25          The United States government is in possession

1 of multiple, independent pieces of information relating  
2 to the Turkish government's efforts to influence United  
3 States policy on Turkey and Fethullah Gulen, including  
4 information relating to communications, interactions,  
5 and a relationship between Ekim Alptekin and Michael  
6 Flynn and Ekim Alptekin's engagement of Michael Flynn  
7 because of Michael Flynn's relationship with an ongoing  
8 presidential campaign without any reference to the  
9 defendant or FIG.

10 Referring now to Defendant's Exhibit 6,  
11 Stipulated Statement of Fact No. 2 entitled Memorandum  
12 for Record:

13 On 14 September 2016, the undersigned was  
14 instructed to contact Lieutenant General Michael Flynn,  
15 USA retired, who had indicated he wanted to make a  
16 report in person.

17 On 15 September 2016, the undersigned and  
18 Curtis Guy met with Lieutenant General Flynn at this  
19 place of business, 44 Canal Center Plaza, Suite 400,  
20 Alexandria, Virginia. He advised as follows: He as  
21 planning to go to Japan in October 2016 to meet with  
22 the Japanese minister and deputy minister of defense.  
23 On 19 September 2016, he planned to meet with the  
24 president of Egypt, Abdel Fattah el-Sisi, in New York  
25 at the Egyptian Consulate. That day he also planned to

1 meet with the Turkish foreign minister (NFI) and  
2 possibly might also meet Erdogan, the Turkish  
3 president, in New York. He was not questioned about  
4 any past foreign contacts or travel since his military  
5 retirement as it was believed that matter was covered  
6 during his recent background investigation, and it was  
7 not reason he contacted DIA on this occasion.

8 He also mentioned that his company was  
9 supporting a Dutch company (NFI) to assist in renewing  
10 the confidence of the international community in the  
11 Turkish government. He used the terms "strategic  
12 advantage" and "confidence project." He provided no  
13 further details.

14 This document is signed by Karl James, Chief  
15 SEC-2, and dated March 21, 2017.

16 The last document is Defendant's Exhibit 14  
17 entitled Stipulated Statement of Fact No. 3:

18 In a meeting with a U.S. government agency on  
19 September 28, 2016, Bijan Rafiekian provided an  
20 overview of the Flynn Intel Group, outlined recent  
21 business activities and potential access. Rafiekian  
22 reported the following:

23 Rafiekian continues to work on business in  
24 Qatar, Saudi Arabia, Turkey, and Kazakhstan. The Flynn  
25 Intel Group is involved in both security consulting and

1 aviation, including unmanned aerial vehicles and  
2 unmanned aircraft systems. On the aviation side, the  
3 Flynn Intel Group is working with the government of  
4 Georgia to establish a hub in Tblisi, Georgia, for  
5 SOCOM-related cargo transport.

6 Rafiekian shared that he was aware of an  
7 investigation into an educational compound in  
8 Pennsylvania that was tied to the Fethullah Gulen  
9 movement (FGM). A Turkish teacher at the complex  
10 claimed that teachers were required to return  
11 40 percent of their earnings to the school  
12 administrators. Further, although the teachers were  
13 not native English speakers, they were identified as  
14 English teachers, which raised suspicions. Rafiekian  
15 believed that the compound, its activities, and  
16 staffing were concerning and highlighted this.  
17 Rafiekian has been asked to consult on a  
18 documentary-style commercial to raise awareness about  
19 the concerning activities/suspensions regarding this FGM  
20 school/compound.

21 Rafiekian identified Ekim Alptekin, a  
22 Turkish-Dutch dual national, as a business contact.  
23 Rafiekian claims that he provided a reference for  
24 Alptekin, whom he described as the head of the American  
25 chamber of commerce in Turkey. Alptekin has senior

1 level contacts in the Turkish government, particularly  
2 related to finance and economics, and was previously  
3 involved with the Eclipse Aviation, a company that  
4 produces small jet planes in New Mexico. Alptekin is  
5 also the sole owner of Inovo, a Dutch company.

6 Rafiekian also provided business cards for  
7 the Flynn Intel Group.

8 THE COURT: Thank you.

9 MR. MACDOUGALL: Your Honor, the defense  
10 rests.

11 THE COURT: All right. Thank you.

12 Mr. Gibbs, does the government have any  
13 rebuttal?

14 MR. GIBBS: We do not, Your Honor.

15 Thank you.

16 THE COURT: All right. Ladies and gentlemen,  
17 you have now heard all the evidence in the case.  
18 Before you begin your deliberations, we need to take up  
19 some procedural matters and then instruct you as to the  
20 law and then have closing arguments.

21 I'm going to excuse you to the jury room at  
22 this time. I hope to bring you back out shortly and  
23 let you know what our schedule is going to be going  
24 forward.

25 So you're excused for right now. Please do

1 not discuss this case among yourselves.

2 Thank you.

3 (The jury exits at 10:29 a.m.)

4 THE COURT: Please have a seat.

5 Mr. MacDougall.

6 MR. MACDOUGALL: Your Honor, Mr. Tysse will  
7 take up the argument for the defense.

8 THE COURT: All right. Let's see where we  
9 are after the motion.

10 MR. TYSSE: Thank you, Your Honor.

11 We've had a chance to review the jury  
12 instructions and have four points to make.

13 The first one with regard to the conspiracy  
14 count as to what constitutes unlawful conduct under  
15 Section 951 and 618(a), we simply would like to  
16 preserve our argument that this -- to prove something  
17 that is not a legal commercial transaction requires a  
18 willful state of mind.

19 THE COURT: All right.

20 MR. TYSSE: With respect to the -- what  
21 constitutes a violation of 618(a), we'd like to object  
22 to the definition of "material" that Your Honor has  
23 chosen.

24 THE COURT: All right.

25 MR. TYSSE: The reason, Your Honor, is the



1 definition unlike either -- the definition that defense  
2 suggested or the government -- the defense that it was  
3 significant or important or the government that it was  
4 capable of influencing government action, we think the  
5 language proposed referring to whether the information  
6 is inaccurate or misleading is a pretty low bar for  
7 what might constitute something that's material.

8           And, in fact, the word "inaccurate" in  
9 particular I don't think adds a lot to the current  
10 language of the statute, which is whether something is  
11 false. False and inaccurate are kind of the same  
12 thing. So I think if we chose this sort of language,  
13 inaccurate or misleading, you're going to essentially  
14 read the word "material" out of the statute.

15           And we know from the *Escobar* case that Your  
16 Honor, I think, referred to the other day, it said that  
17 materiality is a very high standard and, you know, it's  
18 the government's obligation to put forth the proof of  
19 that.

20           So I think merely requiring the government to  
21 show something that's inaccurate -- which, again, is an  
22 extremely low bar and, I think, inconsistent with the  
23 meaning of material. We suggest that it should be  
24 either, you know, significant or important, something  
25 that's a synonym of material or something capable of

1 influencing government action.

2 With respect to that same definition Your  
3 Honor proposed --

4 THE COURT: So what would you be proposing?  
5 Anything other than what you've already proposed?

6 MR. TYSSE: Yeah. I think we'd continue to  
7 suggest the language that we proposed in our original  
8 jury instruction. But, in particular, inaccurate and  
9 misleading. Like I said, I think it reads out the word  
10 "material" a little bit from the statute.

11 THE COURT: All right.

12 MR. TYSSE: Because even a minor sort of  
13 immaterial statement could still be inaccurate or  
14 misleading to some extent.

15 With respect to the same definition, Your  
16 Honor defines willfully as someone who knowingly  
17 performs an act deliberately and intentionally as  
18 contrasted with accidentally, carelessly, or  
19 unintentionally.

20 Your Honor, we propose that that should also  
21 include knowledge that the conduct itself was unlawful.  
22 We cited a couple of cases for that. I think the  
23 *Bursey* case from the Fourth Circuit. I believe it was  
24 from the Fourth Circuit.

25 If you will indulge me. I'm sorry. Yeah.

1 Yeah. The *Bursey* case from the Fourth Circuit and both  
2 the *Bryan* case -- both define willfully in contrast and  
3 knowingly as someone having acted with knowledge that  
4 his conduct was unlawful. We think that is what  
5 actually distinguishes willful from knowing and  
6 accordingly would object to that language not being  
7 included.

8 THE COURT: All right.

9 MR. TYSSE: On the Count 2 charge, Your  
10 Honor, this is the third of the four points. On the  
11 Count 2 charge, it's a similar sort of charge -- or a  
12 similar sort of objection, which is that the third  
13 element says that Bijan Rafiekian acted knowingly. We  
14 would request in line with our proposed instruction  
15 that that knowingly include additional information  
16 based on the *Liparota* case, that the knowledge in this  
17 context because it would otherwise criminalize unlawful  
18 conduct -- or excuse me, legal conduct should be  
19 knowledge that conduct was not authorized by the  
20 statute or regulation. That's the *Liparota* case. I'm  
21 happy to talk about that further or send you the cite,  
22 but I believe it's in our papers.

23 Similarly, that the knowledge that he was  
24 actually required to register I think that's what it  
25 would mean in this context. And that comes from the

1 *X-Citement* case as well. And the idea is that the  
2 knowingly would apply to each of the prior elements.  
3 And because one of the elements is that Mr. Rafiekian  
4 acted in the United States as an agent of a foreign  
5 government when required to register. So he had to  
6 know that he was required to register. That comes from  
7 the *X-Citement* case.

8           The fourth point I'll make, Your Honor, is  
9 that in light of Your Honor's 801(d)(2)(E) ruling with  
10 respect to coconspirator statements, we would  
11 propose -- it's not in the proposed instructions --

12           THE COURT: Do you have the cite for the  
13 *Liparota* case?

14           MR. TYSSE: I do. It's *Liparota v. United*  
15 *States*, 471 U.S. 419.

16           There's also a very recent Supreme Court  
17 decision, *Rehaif v. United States*, R-E-H-A-I-F, 139 S.  
18 Ct. 2191. That's 2019.

19           THE COURT: 2019, is that what you said?

20           MR. TYSSE: 2191. 139 S. Ct. 2191. It was  
21 just issued about a month ago.

22           THE COURT: All right.

23           MR. TYSSE: But that -- it says the same  
24 thing, and it says it's not a situation where  
25 evidence -- or, I'm sorry, ignorance of the law is no

1 excuse. But, rather, that in certain contexts, it's  
2 still the government's burden to show that the  
3 defendant actually was aware that his conduct was  
4 unlawful. Because otherwise you're criminalizing  
5 things that would otherwise not be --

6 THE COURT: You referenced a Fourth Circuit  
7 case as well, I believe.

8 MR. TYSSE: Yes. That one is the *Bursey*  
9 case. I believe it's *United States v. Bursey*, 416 F.3d  
10 301. That's Fourth Circuit, 2005.

11 THE COURT: All right.

12 MR. TYSSE: And what that holds is that for a  
13 defendant to have acted willfully as opposed to  
14 knowingly, he must have acted with knowledge that his  
15 conduct was unlawful.

16 THE COURT: All right.

17 MR. TYSSE: And that, in turn, quotes *United*  
18 *States v. Bryan*, a Supreme Court case, that says the  
19 same thing, and it's specifically contrasted with  
20 knowingly.

21 The fourth and final point on the  
22 instructions, Your Honor, is that in light of Your  
23 Honor's ruling with respect to 801(d)(2)(E), we think  
24 it would be appropriate to include a short instruction  
25 that reiterates that point to the jury.

1 THE COURT: All right.

2 MR. TYSSE: Your Honor said multiple times  
3 during the trial, but we think it would be important to  
4 remind the jury of that.

5 Now, a final point, Your Honor, that is not  
6 related to the jury instructions, but we'd like to  
7 move, again, for judgment of acquittal under Rule 29.

8 THE COURT: All right. I know you've filed a  
9 brief on that.

10 MR. TYSSE: That's right.

11 THE COURT: Do you want to just summarize  
12 briefly that, or do you want to say anything further?

13 MR. TYSSE: Sure, Your Honor. I think we've  
14 probably said it best in the papers that we've already  
15 filed.

16 THE COURT: All right.

17 MR. TYSSE: Essentially, it's what we've have  
18 also talked about this morning as well.

19 THE COURT: All right. That's fine.

20 MR. TYSSE: At the end of the day, this  
21 requires an agreement to commit an unlawful act. We  
22 think that's where the government's case has gone awry.

23 THE COURT: All right.

24 MR. TYSSE: Thank you.

25 MR. TURGEON: Thank you, Your Honor.

1 First, with regard to the materiality jury  
2 instruction --

3 THE COURT: Yes.

4 MR. TURGEON: -- we would suggest that the  
5 Court give the instruction that we proposed last night.  
6 The one notable difference in that from what the  
7 defense has proposed or what the Court has proposed is  
8 that it actually does cite the statute for materiality.

9 In Section 612 of FARA, Subsection A, it says  
10 that the registration statement shall include the  
11 following, which shall be regarded as material for  
12 purposes of this subchapter. Then it lists, I believe,  
13 11 subcategories of information.

14 THE COURT: Aren't those categories reflected  
15 on the registration form itself that's in evidence?

16 MR. TURGEON: Your Honor, yes, they include  
17 what's listed on the form. In fact, Subsection 10  
18 says -- I'm going to paraphrase. Subsection 10 says  
19 essentially anything on the form is material.

20 THE COURT: Right.

21 MR. TURGEON: So what the government --

22 THE COURT: Instead of having that  
23 description, I made reference to the form. Why isn't  
24 that adequate? I made reference to the information  
25 requested in the form.

1 MR. TURGEON: Yes, Your Honor. I apologize.  
2 I'm flipping to that.

3 Is Your Honor referring to the language for  
4 the purpose of determining whether a false statement --

5 THE COURT: Yes.

6 MR. TURGEON: Your Honor, in addition to the  
7 FARA registration statement, we would request that that  
8 say "and associated forms" essentially since there are  
9 several. I mean, not to be hypertechnical, but there's  
10 the registration statement. There's the supplemental  
11 statement. There's Exhibit A. I mean --

12 THE COURT: Those are all in evidence?

13 MR. TURGEON: A variety of forms. Yes, Your  
14 Honor, that's right.

15 THE COURT: What about what makes an accurate  
16 or misleading language? Do you have any objections to  
17 that? The defense wants those qualified in some  
18 fashion.

19 MR. TURGEON: Your Honor, we think -- I mean,  
20 I think our instructions, I would say, do a good job of  
21 laying out essentially what's required to prove a  
22 violation of 618(a)(1). That's --

23 THE COURT: So what you would say is simply  
24 whether the false statement or omission makes --

25 MR. TURGEON: The statute, Your Honor,



1 says -- again, looking at the statute: In any  
2 registration statement or supplement thereto or any  
3 other document, a false statement of a material fact  
4 are willfully -- makes a false statement of a material  
5 fact or willfully omits any material fact required to  
6 be stated therein or willfully omits a material fact or  
7 a copy of a material document necessary to make the  
8 statements therein and the copies of documents  
9 furnished therewith not misleading.

10 So, Your Honor, there's essentially three  
11 ways you can qualify under that provision, and we'd  
12 request that the instruction say that.

13 THE COURT: Well, it mentions misleading is  
14 the only thing I heard in that definition pertaining to  
15 materiality.

16 MR. TURGEON: No, not pertaining to  
17 materiality there. No, Your Honor.

18 THE COURT: All right.

19 MR. TURGEON: And with regard to the second  
20 item on my list, willfulness, in accordance with Your  
21 Honor's previous ruling that the willfulness will not  
22 be imputed to the legal commercial transaction element,  
23 we're fine with the instruction referencing the Supreme  
24 Court's opinion in *Bryan*, but we would request that  
25 that be given immediately after the materiality

1 instruction.

2 THE COURT: Which instruction are you on now?

3 MR. TURGEON: I apologize, Your Honor. I  
4 don't have --

5 THE COURT: This is under 951?

6 MR. TURGEON: No, Your Honor. Under the law  
7 of the conspiracy. What I understood Mr. Tysse to be  
8 referring to was the instruction that the defense  
9 originally proposed on willfulness --

10 THE COURT: Yes.

11 MR. TURGEON: -- in arguing that that second  
12 sentence be given. The government has no opposition to  
13 that second sentence being given.

14 THE COURT: All right.

15 MR. TURGEON: So the instruction reflects the  
16 *Bryan* decision.

17 THE COURT: So materiality would include --  
18 I'm sorry. Willfully will include knowledge that the  
19 conduct is unlawful?

20 MR. TURGEON: Yes, Your Honor. For purposes  
21 of the conspiracy in Count 1, yes.

22 THE COURT: All right.

23 MR. TURGEON: But, again, in the sequence of  
24 instructions, if that is to be a separate instruction,  
25 we'd ask that it be given immediately after the

1 materiality instruction so that it's clear to the jury  
2 that the willfulness applies only to the violation of  
3 618.

4 And I'm convinced, Your Honor, that the  
5 willfulness instruction isn't entirely necessary. The  
6 forms make that pretty clear given the evidence at  
7 trial, but we're fine with that.

8 THE COURT: I believe, though, he was  
9 referring to the knowledge element in Count 2, the  
10 knowingly --

11 MR. TURGEON: As I understand, Your Honor,  
12 that's a separate question, and that's not what I was  
13 just talking about.

14 THE COURT: No. I understand. All right.

15 MR. TURGEON: Then, Your Honor, we would  
16 contend that there's no need for a separate instruction  
17 to inform the jury, once again, the purpose for which  
18 those statements were admitted. I mean, they've heard  
19 Your Honor's admonishment enough times they could  
20 probably recite it from memory, but that's up to the  
21 Court.

22 THE COURT: All right. I'll consider it and  
23 decide what to do on that.

24 Anything else on the instructions?

25 (No response.)

1           THE COURT: I've gone through the others, the  
2 proposed joint instructions, as well as everybody's  
3 nonagreed to instructions. We'll get those to you  
4 shortly. You can go through those, and we can take  
5 those up.

6           Anything else on these that I've --

7           MR. TURGEON: Your Honor, there's one other  
8 thing on Your Honor's -- which I alluded to earlier --  
9 on Your Honor's proposed instruction about what  
10 constitutes unlawful conduct under Section 951. On the  
11 second page of that instruction, the paragraph begins,  
12 The government alleges that the conspiracy had as one  
13 of its objectives --

14           I mean, that is one of the violations of law  
15 that the government has alleged. It's not the only  
16 one, though, and our reply brief makes that clear.  
17 It's not just about failure to register. It's failure  
18 to comply with numerous provisions of FARA independent  
19 of and in a separate section from the registration  
20 requirement.

21           And so that continues on to the following  
22 page, Your Honor, where it says, The government has,  
23 therefore, proved that a conspiracy had one of its  
24 object -- one of its -- the conspiracy had as one of  
25 its objectives conduct that satisfied the essential

1 elements of a violation of 612(a).

2 That's not the only way that, Your Honor --  
3 Your Honor, that the government can prove that it  
4 wasn't a legal commercial transaction.

5 THE COURT: What else? The Lobbying Act?

6 MR. TURGEON: Yes, Your Honor. In addition  
7 to 612(a), there are numerous provisions of --

8 THE COURT: Well, you have to tell me what  
9 they are. I can't tell the jury there are numerous  
10 provisions.

11 MR. TURGEON: Yes, Your Honor. Our proposed  
12 instructions lay them out and identify them by -- the  
13 ones we filed last night lay them out by the statute  
14 and the text of the statute. It's --

15 THE COURT: Hold on.

16 Which instruction is it in?

17 MR. TURGEON: It is the one that we proposed  
18 last night, Your Honor.

19 THE COURT: Which number?

20 MR. TURGEON: I don't believe it has a  
21 number, Your Honor. It's the one that includes several  
22 block quotes, I believe, and identifies Section 614(a),  
23 614(b), 614(e) and (f), I believe, are the sections  
24 identified. Those are the other provisions aside from  
25 the registration requirement that were violated.

1           And then in that instruction as well, Your  
2 Honor, we address the provisions of the Lobbying  
3 Disclosure Act that were violated. I believe  
4 Mr. Gillis would like to speak to that issue.

5           THE COURT: Those are the provisions that --  
6 the 614, I don't have the statute in front of me.  
7 Those are the ones that relate to who constitutes an  
8 agent of a foreign principal?

9           MR. TURGEON: No, Your Honor. Those  
10 provisions concern -- well, the section is titled  
11 Filing and Labeling of Political Propaganda. If I  
12 could paraphrase them, Your Honor, essentially, 614(a)  
13 says that anyone who is an agent of a foreign principal  
14 and required to register, whether or not they have  
15 registered, needs to file copies of disseminated  
16 informational materials with the Department of Justice  
17 within 48 hours of doing so.

18           Subsection (b) includes labeling requirements  
19 for such materials, which were not met in this case.

20           Subsection (e) details the requirements  
21 that -- the disclosures that someone needs to make when  
22 they're lobbying on behalf of a foreign principal  
23 before they do that lobbying.

24           THE COURT: All right.

25           MR. TURGEON: And (f) concerns appearances

1 before Congress.

2 So those four provisions of Section 614 are  
3 also violations.

4 THE COURT: You're including (f)?

5 MR. TURGEON: Yes, Your Honor.

6 THE COURT: All right. You don't have that  
7 in your instruction, I don't believe.

8 MR. TURGEON: Oh, Your Honor, actually, (f)  
9 was in our brief but not in our instructions. So, no  
10 (f), Your Honor.

11 THE COURT: No (f). All right.

12 MR. TURGEON: That's not relevant here.

13 THE COURT: All right.

14 MR. TURGEON: And then Lobbying Disclosure  
15 Act provisions appear just before that in that proposed  
16 instruction, Your Honor.

17 THE COURT: All right.

18 MR. TURGEON: And there are several of those.  
19 That's all. Thank you.

20 THE COURT: All right.

21 MR. GILLIS: I'm sorry, Your Honor.

22 THE COURT: Yes.

23 MR. GILLIS: If I could, I just wanted to  
24 respectfully point out what I believe is -- I believe,  
25 Your Honor, I respectfully submit that the third --

1 fourth page of the instructions under conspiracy,  
2 existence of an agreement, in that fourth line up from  
3 the bottom, proof of the conspiracy may be made by  
4 circumstantial evidence and --

5 THE COURT: Which one is it? It's the --

6 MR. GILLIS: Sorry. It's the -- on  
7 conspiracy, existence of an agreement --

8 THE COURT: Yes.

9 MR. GILLIS: -- the fourth line from the  
10 bottom, I believe it's meant to say, It need not and  
11 normally will not be proven by direct evidence.

12 I just think that the "a" should be an "and"  
13 there instead.

14 THE COURT: Yes. Thank you.

15 All right.

16 MR. TURGEON: One more thing, Your Honor,  
17 with regard to Your Honor's proposed instruction about  
18 conspiracy and membership in an agreement --

19 THE COURT: Yes.

20 MR. TURGEON: -- there are a couple of points  
21 I wanted to raise there.

22 THE COURT: Yes.

23 MR. TURGEON: The end of the second paragraph  
24 ends: A member of the conspiracy or a  
25 conspiratorial -- I believe that should be agreement or



1 something to that effect.

2 THE COURT: Where are we?

3 MR. TURGEON: Paragraph 2, the very last  
4 line.

5 THE COURT: A member of the conspiracy or a  
6 conspiratorial agreement, yes.

7 MR. TURGEON: In the next paragraph, Your  
8 Honor, it says, The government must prove the defendant  
9 intended to commit the substantive offenses that are  
10 the alleged unlawful objectives of the conspiracy. I  
11 believe that should be commit one of the substantive  
12 offenses.

13 THE COURT: At least one?

14 MR. TURGEON: Yes, Your Honor.

15 THE COURT: Okay.

16 MR. TURGEON: And then the very last sentence  
17 on that page, Acts of covering up even though done in  
18 the context of a mutually understood need for secrecy  
19 cannot themselves constitute proof the concealment of  
20 the crime was part of the original agreement.

21 Your Honor, in the context of this case, we  
22 believe that that language is misleading, essentially.  
23 I mean, from the very beginning, as Mr. Gillis laid  
24 out, covering up the existence of -- the involvement of  
25 Turkish government officials in the project was part of

1 the conspiracy from the very beginning. So we would  
2 object to that language for that reason.

3 THE COURT: All right. I'll consider that.

4 MR. TURGEON: Thank you.

5 THE COURT: Mr. Tysse, why don't we start  
6 with the last point on membership in the agreement.

7 MR. TYSSE: Which language in particular?

8 THE COURT: The acts of covering up.

9 MR. TYSSE: I'm sorry. I'm trying to find  
10 the language, Your Honor.

11 THE COURT: It's in the conspiracy,  
12 membership, and an agreement.

13 MR. TYSSE: I'm sorry. Okay. I skipped that  
14 page.

15 THE COURT: The last sentence. I don't have  
16 the citations. I'm trying to --

17 MR. TYSSE: So the government contends that  
18 this is misleading in the context of this case?

19 THE COURT: Yes.

20 MR. TYSSE: I mean, Your Honor, I think the  
21 government's argument begs the question a little bit,  
22 which is that they're assuming illegality and then  
23 suggesting that what we contend are totally true  
24 statements are -- should be and can be construed as  
25 acts of covering up. We don't think that's consistent

1 with conspiracy law. We think there needs to be  
2 additional evidence beyond just what they allege to be  
3 acts of cover up.

4 THE COURT: I don't have your citations.  
5 Where does that come from? Do you know?

6 MR. TYSSE: What case?

7 THE COURT: Yes.

8 MR. TYSSE: I don't --

9 THE COURT: The source of that instruction?

10 MR. TYSSE: I don't have it handy, Your  
11 Honor.

12 THE COURT: All right. I can track it.

13 MR. TYSSE: I'm sorry.

14 THE COURT: All right. I'll look at it.

15 All right. What about the legal commercial  
16 transaction instruction, including the reference to the  
17 Lobbying Disclosure Act and the other provisions of  
18 FARA that the government has proposed in its  
19 instruction?

20 MR. TYSSE: Your Honor, we object. We object  
21 for a number of reasons. We think that it is, frankly,  
22 shocking that at this point in the case, on the eve of  
23 the case going to the jury, the government literally  
24 last night for the first time is suggesting that there  
25 were other nonlegal commercial transactions than the

1 one they've said was illegal all along. I think if you  
2 look at the evolution of the government's theory with  
3 this point, it's very telling and goes exactly to why  
4 we moved to dismiss this case from the get-go.

5 In the beginning, the government gave us a  
6 superseding indictment, issued a superseding  
7 indictment, went to a grand jury without ever  
8 specifying what our client did that was in any way  
9 anything other than a legal commercial transaction.  
10 They listed that we did lobbying and op-ed work that  
11 was protected by the First Amendment. They did not  
12 specify that there was any underlying violation of the  
13 FARA statute. They certainly don't refer to the FARA  
14 statute in particular, and they don't even say that  
15 during that time we should have -- we should have, you  
16 know, registered under FARA.

17 Instead, what they charged us with was 18 --  
18 my client with was 18 U.S.C. 951, which has a lower  
19 *mens rea* and a higher jail term. And we think -- like  
20 I said, it is shocking and frustrating that, again,  
21 right now for the very first time we're hearing that  
22 there's all of these other new violations of both the  
23 FARA and the LDA. I mean, I think it's wrong enough  
24 that the government suggests that there are now  
25 additional FARA violations besides 612(a)

1 notwithstanding the arguments made in the motion to  
2 dismiss briefing when the government could have raised  
3 this argument and in Your Honor's prior ruling, which  
4 recognized that 612(a) was the only statute the  
5 government suggested we violated. But now they're  
6 actually bringing in an entirely separate statute that  
7 they say constitutes something other than an illegal  
8 commercial transaction.

9 THE COURT: All right.

10 MR. TYSSE: If Your Honor recalls, when we  
11 moved to dismiss, we did so on the ground that this is  
12 a -- not only a problem with the elements of the  
13 offense, Your Honor, but it is also a notice issue.

14 THE COURT: Right.

15 MR. TYSSE: It is a notice issue both for  
16 purposes of preparing the defense but also just so the  
17 grand jury -- it's brought to the grand jury's  
18 attention what the crimes were that my client is  
19 alleged to have violated or -- excuse me, what statutes  
20 my client is alleged to have violated.

21 And I do not think it is appropriate at this  
22 stage after all we've been through -- this is also not  
23 the first time that the government had a chance to  
24 propose jury instructions that we're now getting brand  
25 new crimes we've had no chance to put on evidence of,

1 no chance to defend.

2           This is, I think, extremely inappropriate.  
3 We think the Court has already ruled on this issue and  
4 said 612(a) is the only nonlegal commercial transaction  
5 alleged, and that's where this should rest.

6           THE COURT: All right. Tell me, again, your  
7 position with respect to the knowledge requirement in  
8 Count 2.

9           MR. TYSSE: In Count 2, Your Honor, yes.

10          THE COURT: The acted knowingly.

11          MR. TYSSE: Exactly. So this count requires  
12 that the defendant have acted knowingly. And the  
13 question is what does that mean in this context? And  
14 what we say for a couple of reasons -- both the  
15 *X-Citement* case, which suggests that the knowingly  
16 element applies to each of the prior elements,  
17 including that Bijan Rafiekian acted in the United  
18 States as an agent of a foreign government --

19          THE COURT REPORTER: I'm sorry?

20          MR. TYSSE: Excuse me.

21          -- including that Bijan Rafiekian acted in  
22 the United States as an agent of a foreign government  
23 if required to register by regulations promulgated by  
24 the attorney general.

25          So we think that knowingly element applies to

1 that as well and, therefore, would require him to have  
2 known he was supposed to register. And the reason why  
3 this --

4 THE COURT: Acted knowingly -- what would you  
5 add to that? Knowingly with respect to the requirement  
6 to --

7 MR. TYSSE: Right. I think our proposed jury  
8 instructions set it out, I believe, with a separate  
9 element. One, that Mr. Rafiekian acted; two, that he  
10 failed -- that he was required to notify the attorney  
11 general, which, again, is part of the first sentence.

12 THE COURT: So the issue is whether the  
13 knowingly element applies to that portion of the  
14 statute as well.

15 MR. TYSSE: Exactly.

16 THE COURT: All right.

17 MR. TYSSE: And, Your Honor, we believe it  
18 does for a couple of reasons: One is the *X-Citement* --

19 THE COURT: Right.

20 MR. TYSSE: -- case which says that  
21 essentially -- and that was reiterated in the *Rehaif*  
22 case, the R-E-H-A-I-F. But we think it's also true  
23 because of the *Liparota* case. And if you look at the  
24 facts of that case, we think it's very analogous to  
25 this one. That was a situation where it was --

1 THE COURT: What you want to say is -- the  
2 way this is set up, it says Rafiekian acted as an  
3 agent, that he failed to notify the attorney general,  
4 and that he acted knowingly.

5 And you want a separate statement that makes  
6 it clear that the knowingly requirement applies both to  
7 his acting as an agent and also knowingly with respect  
8 to the fail to notify element?

9 MR. TYSSE: That's right, Your Honor.

10 THE COURT: All right.

11 MR. TYSSE: And so I think there's a couple  
12 of ways to do it. We think one would just to add a  
13 sentence perhaps prior to the paragraph beginning, "As  
14 the Court has previously instructed," just making that  
15 clear. Because, you know, given both the *X-Citement*  
16 case but also the *Liparota* case, which involved a  
17 situation where it was a crime to possess food stamps  
18 except as authorized by law or something like that.  
19 And what the Supreme Court held -- I don't have it  
20 handy with me, but it essentially says because there's  
21 nothing inherently wrongful with possessing food stamps  
22 even though it's just a knowingly offense.

23 In that situation, the government must prove  
24 that they actually knew that they were not allowed to  
25 have them. Of course, that doesn't mean that the



1 defendant must know the specific provision of law or  
2 anything like that, but there must be actual criminal  
3 intent with respect to that element because otherwise  
4 you could be criminalized for writing op-eds and  
5 selling consulting services to paying clients. And  
6 that's the point.

7           You asked me before, Your Honor, about our  
8 citation for that point. It's a Supreme Court case.

9           THE COURT: On which one?

10          MR. TYSSE: On the conspiracy point before.  
11 I'm sorry.

12          THE COURT: The acting, the covering up?

13          MR. TYSSE: That's right. And the citation  
14 we have for that is the *Grunewald*, G-R-U-N-E-W-A-L-D,  
15 *v. United States*, 353 U.S. 391. It's a 1957 Supreme  
16 Court case.

17          THE COURT: 353 391?

18          MR. TYSSE: 353 U.S. 391.

19          THE COURT: All right.

20          MR. TYSSE: I think that stands for that  
21 proposition.

22           If there's any other questions Your Honor  
23 has, I'm happy to address those.

24          THE COURT: All right. Okay. Mr. Turgeon.

25          MR. GILLIS: Your Honor, if I could just

1 briefly address the LDA issue, and then Mr. Turgeon  
2 will address the rest of the points.

3 THE COURT: Yes.

4 MR. GILLIS: Your Honor, first of all, in  
5 fairness, the Court's order that ruled that we had to  
6 prove a separate violation to disprove the -- the Court  
7 ruled that we had to prove that the conduct in order  
8 not to be a lawful transaction had to be a violation of  
9 some other statute. That was in the Court's ruling  
10 that came out on the evening -- or late in the  
11 afternoon on Wednesday, and that was really the first  
12 notice that we had certainly after the superseding  
13 indictment. It should come as no surprise, Your Honor,  
14 that we would maintain that the statement in the LDA  
15 was false, that Inovo was --

16 THE COURT: Right. The point that Mr. Tysse  
17 is making, which I think is a substantial one, is that  
18 the Court in response to the motion to dismiss ruled  
19 that the legal transaction piece of this was an  
20 essential element of the offense. Then the issue was  
21 whether the superseding indictment adequately alleged  
22 that as an element. The Court ruled that although it  
23 was not specifically pleaded as such, the Court found  
24 sufficient substance in the superseding indictment to  
25 place the defendant on notice that the legal

1 transaction piece of it was being violated, if you  
2 will, that there was not a legal transaction based on  
3 912(a).

4           It was never argued and the Court never  
5 considered whether the superseding indictment  
6 adequately disclosed that the defendant had engaged in  
7 something other than a legal commercial transaction  
8 because of violations of any other provision, including  
9 the LDA or now 614. It really gets back to whether the  
10 superseding indictment is sufficient for the purposes  
11 of now allowing this case to go to the jury upon a  
12 theory that there was no legal commercial transaction  
13 because of violations of something other than 612.

14           MR. GILLIS: No, Your Honor. It is  
15 exactly -- it is essentially the same. What we're  
16 alleging, Your Honor, is that the false statement on  
17 the LDA, whether it was in violation of the LDA or  
18 whether it was -- the false statement on the LDA form  
19 that Inovo was the client is essentially the only  
20 allegation that we are making that has to do with  
21 that -- excluding it from a lawful transaction. That  
22 can hardly come as a surprise to them because they've  
23 had that LDA filing from the beginning. We've alleged  
24 that that statement was false.

25           They have raised it themselves as one of the

1 defenses that it was made. They certainly could assume  
2 that we were going to argue that the advice of counsel  
3 does not apply because he didn't fully reveal the facts  
4 and he lied about the -- about the existence of --  
5 about who the client was.

6 And so I submit that it's fair for us to  
7 argue that that was one of the means by which it was  
8 not a lawful commercial transaction.

9 THE COURT: Well, that's why I have to go  
10 back and look at it. Whether the substance of the  
11 superseding indictment is sufficient to cover what you  
12 are now claiming in substance were violations other  
13 than 612 or whether this constitutes some kind of a  
14 constructive amendment or improper variance from the  
15 superseding indictment.

16 MR. GILLIS: All right, Your Honor. Thank  
17 you very much.

18 THE COURT: All right. Mr. Turgeon, let me  
19 ask you: With respect to this knowingly element in  
20 Count 2, is there any objection to making it clear that  
21 the knowingly element applies both to the defendant  
22 acting as an agent and also failing to notify the  
23 attorney general?

24 MR. TURGEON: I mean, essentially, Your  
25 Honor, the knowing requirement applies to every element

1 of the offense.

2 THE COURT: Right.

3 MR. TYSSE: It's in Your Honor's discretion  
4 how best to explain that to the jury.

5 THE COURT: All right.

6 MR. TURGEON: Your Honor, there is one  
7 statute -- excuse me -- one decision that I wanted to  
8 cite for Your Honor in reference to that point I raised  
9 about the -- about whether -- to what extent proof of a  
10 cover-up can serve as evidence of the conspiracy. And  
11 that's the *United States v. Mann* case. It's a Fourth  
12 Circuit case from --

13 THE COURT: Hold on a second.

14 MR. TURGEON: Excuse me?

15 THE COURT: Just one second. I need to make  
16 those notes in the right place.

17 MR. TURGEON: Yes, Your Honor.

18 THE COURT: *U.S. v. Mann*?

19 MR. TURGEON: *Mann* with two Ns, a Fourth  
20 Circuit case from 1991. We cited it previously.

21 THE COURT: What's the cite?

22 MR. TURGEON: I do not have the cite, Your  
23 Honor, but it is cited in our opposition on the Rule 29  
24 motion.

25 THE COURT: All right.

1 MR. TURGEON: It holds that cover-ups in  
2 highly regulated areas may be acts in furtherance of a  
3 criminal conspiracy.

4 THE COURT: All right. Anything else on  
5 those?

6 MR. TURGEON: Could I have the Court's  
7 indulgence for just one moment, Your Honor?

8 (Counsel confer.)

9 MR. GILLIS: Your Honor, leaning to one side  
10 whether you agree to rule with us on Mr. Turgeon's  
11 argument, I just respectfully submit that that last  
12 sentence is confusing. It's such a compound sentence.  
13 I don't know whether it comes directly from some legal  
14 decision, but just for purposes of giving it to a lay  
15 jury, I believe it could be split up into perhaps more  
16 than one sentence to express the point that the Court  
17 is trying to express there.

18 So if you will permit us, we'll take a crack  
19 at doing that as well.

20 THE COURT: All right.

21 MR. GILLIS: If the Court could also consider  
22 in the meantime what it might be willing to do with  
23 respect to perhaps clarifying that last sentence for a  
24 lay jury.

25 THE COURT: All right.

1 MR. GILLIS: Thank you, Your Honor.

2 THE COURT: Something else, Mr. Tysse?

3 MR. TYSSE: Well, just very briefly, if  
4 you'll indulge me. I promise I'll be quick.

5 First of all, the government mentioned that  
6 this was a -- you know, it was a surprise to them that  
7 the Court was going to require legal commercial  
8 transaction proof as part of the indictment last week.  
9 I don't think it should be a surprise because Your  
10 Honor's order of July 9 says that although Rafiekian is  
11 not charged with a FARA violation under 22 U.S.C.  
12 612(a), which is the only provision that the government  
13 mentioned at the hearing -- as we know, nothing about  
14 the substantive offenses in the indictment itself --  
15 these activities would violate FARA and, therefore, be  
16 illegal if they were covered activities and Rafiekian  
17 willfully engaged in them as an agent of the Turkish  
18 government without a proper FARA registration.

19 The Court found it a close call but made very  
20 clear that was the only unlawful legal conduct -- I  
21 mean legal commercial conduct alleged. And the defense  
22 has been preparing this defense based on that. Today  
23 we receive -- or last night, I guess, we receive the  
24 government's proposed instructions which for the first  
25 time mention a series of other alleged FARA violations.

1 We think there's no evidence of any of these, Your  
2 Honor.

3 But more importantly -- or just as  
4 importantly, I mean, if you look at some of this  
5 language, no persons of an agent or a foreign principal  
6 shall disseminate informational materials on behalf of  
7 a foreign principal without filing two copies of the  
8 materials. There's no evidence in the record about  
9 whether or not any of that happened.

10 And, again, if we had known that this was the  
11 nonlegal commercial activity that was going to be  
12 alleged, then we would have tailored the defense  
13 appropriately. We just think it's way too late for the  
14 government to come forward with this sort of thing.

15 THE COURT: All right.

16 MR. TYSSE: Quickly, the second point, they  
17 mention the LDA shouldn't be a surprise to us either.  
18 LDA is not even mentioned in the indictment. It's only  
19 been a part of the defense. So the idea that we should  
20 have been expecting them to make some sort of argument  
21 that the LDA was illegal just, you know, beg's belief.  
22 There's -- it was never part of the government's case.

23 THE COURT: I think there was a motion *in*  
24 *limine* to prohibit any reference to it.

25 MR. TYSSE: That's true, Your Honor, exactly.



1           Finally, with respect to the LDA too, Your  
2 Honor, there's no evidence that Mr. Rafiekian had any  
3 role in the filing of the LDA or its preparation other  
4 than that initial conversation. I think the testimony  
5 is very clear on that. So, again, you would be really  
6 asking the jury to essentially speculate on whether or  
7 not there may be some illegal -- by reading, you know,  
8 three or four or five pages of different complex LDA  
9 and FARA regulations and provisions, speculate that  
10 maybe something in there is illegal enough to go  
11 forward. We don't think that's the --

12           THE COURT: All right. I'll look at this.

13           MR. TYSSE: Thank you very much.

14           THE COURT: All right. Here's what I'd like  
15 to do. I think I'm going to release the jury until  
16 2:00. I need to review these, and I'll come up with  
17 the Court's decision on how to proceed on these open  
18 issues under the instructions. We also will distribute  
19 to you the balance of the instructions. What I'd like  
20 to do is reconvene at 1:00. Hopefully, we can get to  
21 you the other instructions or the revised instructions  
22 sometime shortly before that.

23           All right. Anything else before I bring the  
24 jury out and tell them how we're going to proceed?

25           MR. TURGEON: No, Your Honor. Thank you.

1 THE COURT: All right. The Court continues  
2 to reserve on the Rule 29 motion.

3 MR. GIBBS: Thank you, Judge.

4 THE COURT: All right. Let's bring the jury  
5 out.

6 (The jury enters at 11:14 a.m.)

7 THE COURT: Please be seated.

8 Ladies and gentlemen, I want to let you know  
9 where we are. As you know, all the evidence is in, and  
10 we're still dealing with some procedural issues that we  
11 need to complete. So what I'm going to do is excuse  
12 you until 2:00 at which time I'm hopeful that we can  
13 reconvene, at which time you'll be given your final  
14 instructions. Then we'll proceed with closing  
15 arguments following which you will begin your  
16 deliberations.

17 So you're excused now until 2:00. Have lunch  
18 or take a walk, clear your head, whatever you want to  
19 do. But it's important that you do not begin any  
20 discussions about this case among yourselves or talk to  
21 anybody about this case. So you're now excused until  
22 2:00.

23 (The jury exits at 11:16 a.m.)

24 THE COURT: Why don't we have a seat for a  
25 moment. I also wanted to just go through some of these

1 instructions that I don't think apply. There was a  
2 proposed instruction on opinion evidence by an expert  
3 witness. I don't think we've had any experts. Have  
4 we? I don't think we have.

5 MR. TYSSE: No objection, Your Honor.

6 MR. TURGEON: No, Your Honor.

7 THE COURT: All right. There was a proposed  
8 instruction on the credibility of witnesses,  
9 accomplices. Again, I don't think that applies. Any  
10 different view on that?

11 MR. TYSSE: No objection.

12 MR. TURGEON: No, Your Honor.

13 THE COURT: Likewise, immunized witnesses, we  
14 don't have any of that; do we?

15 MR. TYSSE: That's correct.

16 MR. TURGEON: No, Your Honor.

17 THE COURT: Nor informants, correct?

18 MR. TYSSE: Correct.

19 MR. TURGEON: No, Your Honor.

20 THE COURT: All right. There's a proposed  
21 instruction on charts and summaries. I don't think  
22 we've had any, have we, admitted or unadmitted?

23 MR. GILLIS: There has been just the listing  
24 of the e-mails and whatnot that the agent and the  
25 computer fellow -- the two computer guys put together,

1 but I don't believe they constitute summaries.

2 THE COURT: Right. Do you think we need an  
3 instruction on it?

4 MR. GILLIS: No, sir.

5 THE COURT: All right. I won't give that.

6 All right. I think that's it. We'll stand  
7 in recess until 1:00.

8 -----  
Time: 11:18 a.m.

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22 I certify that the foregoing is a true and  
23 accurate transcription of my stenographic notes.

24

25

/s/  
Rhonda F. Montgomery, CCR, RPR